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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 376

THE PAINE DRUG COMPANY,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT OF THE COUNTY OF MONROE, NEW YORK

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Petitioner, The Paine Drug Company, prays that a writ of certiorari issue to review the judgment of the County Court of the County of Monroe, New York, rendered in the above entitled proceeding on June 19, 1963.

Opinions Below

The opinion of the County Court of the County of Monroe, New York (R. 354-365), printed in Appendix A. hereto (infra, p. 15), is reported in 30 N. Y. Misc. 2d 834. The opinion of the Appellate Division, Supreme Court, State of New York (4th Dept.), (R. 374-377), printed in Appendix B. hereto infra p. 25), is reported in 22 N. Y. A. D.

2d 156. The Court of Appeals of New York affirmed the decision of the Appellate Division, but rendered no opinion. This judgment of the Court of Appeals, printed in Appendix C. hereto (infra p. 30), is reported in 16 N. Y. 2d 503.

Jurisdiction

The petitioner was accused of violating Sections 2140, 2141, and 2147 of the Penal Law of the State of New York by an indictment filed in the office of the clerk of the County of Monroe on December 21, 1962. The petitioner moved the County Court of the County of Monroe, New York for an order dismissing said indictment on February 11, 1963, and testimony was taken and evidence received in connection with said motion. On June 19, 1963 the County Court rendered an opinion and decision granting said motion and an order in accordance therewith was duly made and entered on June 21, 1963, in the office of the clerk of Monroe County.

The respondent thereafter appealed to the Appellate Division, Supreme Court, State of New York, (4th Dept.) by notice of appeal dated December 16, 1964 (R. 371, 372). An order of the Appellate Division reversing the order of the County Court was entered on December 3, 1964.

Thereafter, the petitioner appealed the order of the Appellate Division to the Court of Appeals of New York. Judgment affirming the order appealed from and remitting the record to the County Court was made and entered on April 22, 1965. The remittitur was filed in the Office of the clerk of the County of Monroe, New York on May 4, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1257 (3).

Questions Presented

1. Should private citizens be permitted to invoke, for reasons of economic competition, the sanctions of an ancient and long ignored penal statute to bring about the arrest and prosecution of a certain class of their business rivals while conceding that they neither seek nor wish general enforcement?

2. Granting that the discriminatory enforcement prohibited by the Fourteenth Amendment to the Constitution of the United States must be purposeful, what is the nature and extent of this motivation and must it be that of a public official?

3. To what extent does the conscious, deliberate non-enforcement of a state penal law by public authorities which permits discrimination by private citizens to occur support the defense of discriminatory law enforcement?

Constitutional and Statutory Provisions Involved

Constitution of the United States, Amendment XIV, Section 1:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Penal Law, Section 2140:

Sect. 2140. The Sabbath.

The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the

doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community.

(As amended, L. 1881, c. 676).

New York Penal Law, Section 2141:
Sect. 2141. Sabbath breaking.

A violation of the foregoing prohibition is Sabbath breaking.

(As amended, L. 1881, c. 676).

New York Penal Law, Section 2147:
Sect. 2147. Public traffic on Sunday.

All manner of public selling or offering for sale of any property on Sunday is prohibited, except as follows:

1. Articles of food may be sold, served, supplied and delivered at any time before ten o'clock in the morning;

2. Meals may be sold to be eaten on the premises where sold at any time of the day;

3. Caterers may serve meals to their patrons at any time of the day;

4. Prepared tobacco, bread, milk, eggs, ice, soda-water, fruit, flowers, confectionery, souvenirs, newspapers, magazines, gasoline, oil, tires, cemetery monuments, drugs, medicine and surgical instruments may be sold and may be delivered at any time of the day;

5. Grocers, delicatessen dealers and bakeries may sell, supply, serve and deliver cooked and prepared foods, between the hours of four o'clock in the afternoon and half past seven o'clock in the evening, in addition to the time provided for in subdivision one hereof, and, elsewhere than in cities and villages having a population of forty thousand

or more, delicatessen dealers, bakeries, and farmers' markets or roadside stands selling fresh vegetables and other farm produce, and fishing tackle and bait stores may sell, supply, serve and deliver merchandise usually sold by them, at any time of the day;

6. Persons, firms or corporations holding licenses and/or permits issued under the provisions of the alcoholic beverage control law permitting the sale of beer at retail, may sell such beverages at retail on Sunday before three antemeridian and after one postmeridian for off-premises consumption to persons making purchases at the licensed premises to be taken by them from the licensed premises.

The provisions of this section, however, shall not be construed to allow or permit the public sale or exposing for sale or delivery of uncooked flesh foods, or meats, fresh or salt, at any hour or time of the day. Delicatessen dealers shall not be considered as caterers within subdivision three hereof. As amended L. 1913, c. 346; L. 1915, c. 278; L. 1921, c. 299; L. 1935, c. 191; L. 1941, c. 878; L. 1942, c. 651, L. 1950, c. 735; L. 1953, cc. 770, 771; L. 1960, c. 729, eff. April 21, 1960.

Statement of the Case

On December 2, 1962, the petitioner, a corporation, was charged with having sold a package of Christmas wrappings on a Sunday at one of its branch stores in violation of New York's Sabbath Laws.

It was one of four small or medium-size drug chains so charged on the same day and one of thirteen medium-size businesses, which included grocery and small department stores, arrested for Sabbath-breaking within a period of two weeks. All of the cases were submitted to either the January, 1963 or February, 1963 Monroe County Grand

Juries as a result of which eleven indictments were returned.

Upon the authority of *People v. Utica's Daw Drug Co.*, 16 N.Y. A.D. 2d 12 (1962), the petitioner moved the County Court of the County of Monroe, New York for an order dismissing the indictment upon the ground that the prosecution was discriminatory and that the petitioner had been denied that equal protection of the laws guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

Testimony and evidence in support of this motion were taken by the Court, sitting without a jury. The Court thereafter granted the petitioner's motion and ordered the indictment dismissed. The Court's opinion contained the following findings:

1. The law in question had not been enforced in Monroe County in over twenty-five years.* (R. 362).

2. The public authorities did nothing to enforce this law although the law was being violated by the public at large. (R. 362).

3. There were ample police to enforce the law. (R. 362).

4. The arrests at issue came about because a relatively small group of merchants known as the Executive Committee of the Retail Merchants Council of the Chamber of Commerce of Rochester, New York approved the action of one or more of its members in purchasing on Sunday articles that were not to be sold on that day, and that this group initiated this prosecution (and the others) for solely economic reasons—meaning reasons of business competition—

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* All references are to pages of the original transcript certified in the record on appeal.

and not for reasons designed to effect a general obedience to the Sabbath law. (R. 362, 363).

5. The public authorities by prosecuting only those defendants whose arrest would not have resulted except for the prior instigation of the Executive Committee, became agents of that merchant group and, as such, chargeable with that group's discriminatory design. (R. 364).

6. The enforcement at issue was designed to discriminate against the defendant. (R. 360).

The People appealed from this order to the Supreme Court, Appellate Division, State of New York (4th Dept.) which appeal resulted in an order reversing unanimously the order of the County Court on the law and reinstating the indictment. In the opinion upon which the reversal was based, the appellate court made the following findings: (R. 374-377).

1. The motive of the retail merchant group which caused these prosecutions was "moral" and, therefore, not illegitimate. (R. 376).

2. Said motive was "moral" because to face the problem of meeting the rising competition of the petitioner and the others these merchants were faced with the problem of staying open on Sunday or forcing the authorities to close their business rivals. (R. 376).

3. The objective of the merchants group was the operators of large supermarkets and drugstores and was selective. (R. 377).

4. But, it was not discriminatory because, in addition to being moral in intent, they—the merchants—could not enforce the law generally because of their limited facilities. (R. 377).

5. The public authorities refused to grant the request of these merchants to prosecute the violators because, in the opinion of the then District Attorney, the law was inconsistent. (R. 375).

6. The prosecution of the petitioner was only remotely caused by the group activity and came about as the result of the even-handed policy of the prosecutor (R. 377), which policy was, not to bring about general enforcement, but to take action only upon specific complaints. (R. 375).

From this order of reversal, the petitioner appealed to the Court of Appeals of the State of New York which unanimously affirmed the decision of the Appellate Division without opinion.

Further prosecution of all eleven indictments awaits the outcome of this petition from the said final judgment on the proceeding.

Raising the Federal Question

The petitioner raised the federal question herein by moving the County Court of Monroe County, New York for an order dismissing the indictment on the ground that it had been denied equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States. (R. 3-6).

The motion was brought prior to trial by notice of motion and affidavit (R. 3-6). A hearing was held to take evidence upon the issues of fact raised by said motion before the Court, sitting without a jury, (R. 355); and the order dismissing the indictment and the appeals heretofore referred to flowed exclusively therefrom.

Reasons for Granting the Writ

This Court has stated consistently since the landmark decision in *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), that the enforcement and administration of a law, impartial in appearance, in a manner indicating conscious discrimination against an individual or class constitutes a denial of equal protection of the laws, *Oyler v. Boles,* 368 U.S. 448 (1962); *Southern Ry. v. Watts,* 260 U.S. 519 (1923); *Two Guys From Harrison v. McGinley,* 366 U.S. 582 (1961).

It has also held consistently that unequal protection of the law is not a denial of equal protection unless intentional or purposeful discrimination is proved, *Snowden v. Hughes,* 321 U.S. 1 (1944); *Sunday Lake Iron Co. v. Township of Wakefield,* 247 U.S. 350 (1918).

The petitioner believes that the instant case presents aspects of this doctrine that have not heretofore been squarely met and which require clarification or definition.

Specifically, the problems are as follows:

1. Once it is established that discrimination has occurred and that it was intentional, must it also be shown that the motive behind the discrimination was intrinsically evil, if not felonious, or will proof of awareness and self-interest suffice?

2. And, again, once all the other necessary elements of the defense have been established, save the motivation, must it also be shown that the intent which caused the discriminatory enforcement was born in the mind of a public official? Or, will proof that the beneficiaries of the scheme were private individuals be adequate to establish the constitutional violation?

3. To what extent does proof of the conscious, deliberate non-enforcement of the law in question which made the discrimination by private individuals possible support the claim of a denial of equal protection of the law?

In the case at issue, both the County Court and the Appellate Division which reversed it are in agreement as to most of the necessary elements of the defense and their presence in this fact situation.

Both courts agreed, or did not dispute, that the Sunday Sabbath laws had not been enforced in Monroe County in over a quarter of a century. (R. 362). They also agreed, or did not dispute, that the public authorities had done nothing to enforce these laws generally in the community and, at the time of the hearing, intended to do nothing on their own initiative to enforce these laws. (R. 362, R. 375).

And, they agreed that the law was being violated openly and flagrantly by the public at large and that the prosecution was selective in that it was addressed to a particular class of defendants. (R. 360, R. 362, R. 377).

The sole area of disagreement revolves about the legal or constitutional import to be given the established motivation, the motivation conceded by both courts, to wit: the impulse of the instigators to meet the rising threat of competition by their business rivals who were selling merchandise on Sunday. (R. 362, R. 365, R. 377).

The County Court relied, amongst other evidence, upon the following statement of one of the principal complainants to find that the motive behind the selective enforcement was "... economic, rather than a desire to have the law enforced and, therefore, discriminatory". (R. 360):

> "Our quarrel is with stores comparable to our own; they are not with little independents; they are

serviced by voluntary cooperatives with all kinds of financial backing."

"When Sunday openings are as extensive as they are we think the law should be enforced. It wasn't so important when they were mom and pop stores, but that isn't the case today; these stores are as big as ours; they are serviced by extremely large wholesalers." (R. 173).

The Appellate Division observed, however, that this is not an illegitimate reason for enforcing the law selectively, since these merchants (not, it will be noted, the public authorities) lacked the facilities to enforce the law generally when the authorities did not choose to do so. (R. 375, 377). And, further, it was observed that it was moral for private citizens to enforce the law selectively when not to do so meant that the complainants would have no alternative but to themselves break the same law. (R. 376).

It is this single dispute as to the necessary nature and extent of the motive behind discriminatory enforcement which, in the petitioner's opinion, is the fulcrum upon which this constitutional defense must rise or fall.

That the dilemma is one worthy of this Court's concern is illustrated by the recent decision of the New York Court of Appeals in *People v. Walker,* 14 N.Y. 2d 901 (1964), which implied that motivation alone without selective enforcement could lead to a denial of equal protection of the law. The decision evoked scholarly criticism, *Vol. 78 Harvard Law Review,* 884 (1965); *Vol. 50 Cornell Law Quarterly,* 309 (1965). It also pointed up the lack of judicial authority in the entire field of unequal law enforcement and the dire need for clarification or definition of the right and a delineation of its boundaries.

As has been observed:

> "• • • it is repugnant to the concept of equal justice to permit petty or anachronistic penal enactments to be used as instruments for the discriminatory harassment of persons or classes.
>
> "Nevertheless, the boundaries of the right remain essentially undelineated, owing to the lack of authoritative judicial consideration of the problem. The rules adduced from cases in other areas of administrative discrimination—that only purposeful discrimination is barred and that reasonable classifications will be permitted—indicate its limits." *Vol. 61 Columbia Law Review,* 1103, p. 1141 (1961).

Entwined within this primary question of defining the nature and limitation of the doctrine of discriminatory enforcement and the character of the motivation behind it are subordinate problems; problems presented by the case at issue.

Among the foremost is the question presented by the fact that almost without exception the decisions in this field describe discriminaion by public authorities only, *Oyler v. Boles, Two Guys from Harrison v. McGinley, Snowden v. Hughes (supra).* That the intent behind the discrimination could also emanate from private interests and violate the constitutional prohibition as well seems never to have been faced judicially. However, an important indication that there should be no distinction between the illegitimate intent of public officials and the motivation of private persons which causes public officials to discriminate appears in the Statement of the Case in *Yick Wo v. Hopkins (supra),* wherein the lower court judge in the accompanying *Wo Lee* matter stated:

> "The effect of the execution of this ordinance in the manner indicated in the record would seem to be

> necessarily to close up the many Chinese laundries now existing * * * The necessary tendency, if not the specific purpose, of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries especially those owned by Chinese, *and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital.*" (Emphasis supplied).

It did not escape that Court that, in addition to the racial question, the problem of economic warfare was vitally present in the prosecution of the two defendants. And, as in the case at bar, there was no indication that the motivation behind the discrimination was that of the public authorities or that they, a ssuch, would benefit economically or otherwise as a result of the prosecutions.

That no such distinction as to motivation should exist also seems evident when it is noted that private citizens, like public officials, also possess the power to sign criminal informations and even make arrests—and, in a situation described in the record herein where a law is being violated by the public at large with the tacit approval of the authorities, they possess the even greater power to determine who is to be prosecuted and why.

Another subordinate problem presented, and the inverse side of the coin, is whether or not the doctrine of discriminatory enforcement may be invoked in a situation wherein the prosecutor has announced he will do nothing on his own initiative to enforce the law except upon specific complaint, (R. 375), which the appellate court found to be the fact in this case and an "even-handed and non-discriminatory . . . policy". (R. 377). Said court also found, however, that the district attorney refused to take action to enforce the

law generally because he felt the Sabbath law was inconsistent and doubted its enforceability. (R. 375).

It has been inferred by this Court that selective administration of a valid statute is permissible when the classification of the persons prosecuted is reasonable as in the case of reasonable legislative classification, *Kotch v. Board of River Port Pilot Comm'rs.*, 330 U.S. 552 (1947).

But, the problem presented herein is rather whether any kind of classified law enforcement is constitutional when the classification is left entirely up to private persons—a situation which has occurred in this instance because of the authorities' announced policy of enforcing the law only upon private complaint.

In order that these questions concerning the doctrine of discriminatory enforcement of a non-discriminatory law may be authoritatively determined, it is respectfully submitted that the judgment below should be reviewed.

CONCLUSION

For these various reasons, this petition for a writ of certiorari to review the judgment of the Monroe County Court should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of Monroe County Court

(SAME TITLE)

Motion by defendant for order dismissing indictment.

Appearances:

For the Motion: Keenan, Carroll, Harris, Creary & Beck, Esqs. (Robert L. Beck, Esq., of Counsel).

Opposed: Hon. John J. Conway, Jr., District Attorney of Monroe County (Nicholas P. Varlan, Esq., of Counsel).

DECISION

OGDEN, J. On December 21, 1962 the Grand Jury of the County of Monroe indicted defendant for the crime of Sabbath breaking, in violation of Sections 2140, 2141 and 2147 of the Penal Law of the State of New York, claiming that the defendant did "willfully and unlawfully publicly sell and offer for sale certain property, the public sale or offering for sale of which on Sunday is prohibited by law." (Ten other individuals or corporations were indicted by the same Grand Jury for similar offenses; another Grand Jury did not indict two other individuals or corporations for similar offenses.)

Defendant seeks an order dismissing the indictment herein upon the ground that the defendant has been denied equal protection of the law, in violation of the Fourteenth Amendment of the United States Constitution and of Article I, Section 11, of the Constitution of the State of New York. Defendant alleges, as the basis for its motion, *not* that the law alleged to have been violated does not apply

equally to all residents of the State of New York, but that the *enforcement* of such valid law against this defendant is *discriminatory*. Pursuant to *People v. Utica Daw's Drug Co.*, 16 A D 2d 12, this Court has held a hearing. This defendant's claim is that the law has been enforced against it in a designedly discriminatory manner, in violation of the equal protection clauses of the State and Federal Constitutions. It has been decided that the law alleged to have been violated is constitutional, and this Court is now asked to decide whether the enforcement of such law is selective only; whether its enforcement is a "striking example" to deter other violators, whether its enforcement is "part of a bona fide rational pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be unnecessary"; whether the lack of enforcement of this particular statute is due to laxity on the part of law-enforcement agencies; or whether "the selective enforcement is *designed to discriminate against* the persons prosecuted, without any intention to follow it up by general enforcement against others."

The laws alleged to have been violated are contained in Article 192 of the Penal Law of the State of New York, and read as follows:

> "Sec. 2140. THE SABBATH.
>
> "The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community."
>
> "Sec. 2141. SABBATH BREAKING.
>
> "A violation of the foregoing prohibition is Sabbath breaking."

"Sec. 2147. PUBLIC TRAFFIC ON SUNDAY.

"All manner of public selling or offering for sale of any property upon Sunday is prohibited, except as follows: * * *."

Certain articles, the sale of which, or offering for sale of which, on Sunday was prohibited, were allegedly purchased at defendant's store, and if the law prohibiting Sabbath breaking were to be held to be properly and impartially enforced, such sale, should it be proven, would render the defendant guilty of a violation of the sections quoted. It is well to note that the classification of a merchandise outlet as a drug, grocery, department, or other store, or of a gasoline station or bakery—to use a few of the names used—is a misnomer, for almost every merchandise outlet in this community sells, or offers for sale, many other articles than one would expect to find therein if the name were strictly construed, according to the testimony received at this hearing. One witness, who instigated several of the arrests made, testified that although his chain of stores was classified as "markets" or "food markets," his stores were in direct competition with the defendant as far as toiletries and cosmetics were concerned.

These Sabbath-breaking laws have been held constitutional (*People v. Friedman,* 302 N. Y. 75, appeal dismissed 341 U. S. 907; *People v. Finkelstein,* 38 Misc. 2d 791), and *Taylor v. City of Pine Bluff,* 289 S. W. Reporter 2d 679, upheld the constitutionality of a similar Sunday law on the ground that it referred to a class of stores. In *Bargain City U. S. A., Inc. v. Dilworth,* 179 Atlantic 2d 439, 407 Pa. 129, an injunction on the basis of discriminatory enforcement of similar Sabbath-breaking laws was denied because the Police Commissioner and the District Attorney, who

threatened the acts complained of, were no longer in office. It has been suggested that rather than attack the Sabbath-breaking laws, an appeal be made to the Legislature, if a change is to be made in their application (*People v. Kupprat,* 6 N Y 2d 88; *People v. Kaplan,* 8 A D 2d 163).

That a denial of equal protection of the law may be predicated upon intentional discriminatory enforcement of a valid or constitutional law has been recognized in *Betty-June School, Inc. v. Young,* 201 N. Y. S. 2d 692 (see also same case in 10 A. D. 2d 648); *People v. Stover,* —— N Y 2d ——, May 9, 1963. Discriminatory enforcement has been recognized as a proper defense in *People v. Harris,* 5 Cal. Rptr. 852; *City of Covington v. Gausepohl,* 250 Ky. 323; *Yick Wo v. Hopkins,* 118 U. S. 356. The *Yick Wo* case has been cited many times. I quote only a portion of one paragraph of the opinion contained therein, as follows:

> " * * * In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions

> of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on is face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (pp. 373, 374.)

Reports of many other cases could be cited, for over the years courts and judges have attempted to find a fair and workable solution to the enforcement of Sabbath-breaking laws, and over too many years the legislative bodies have been loath to recognize the differences brought about by varied and different methods of relaxation, pastimes, automation itself, in the refraining from doing many things on the Sabbath. Moreover, State and Federal legislation controlling the maximum hours of labor in which a citizen may be legally employed and, in effect, compelling at least one day's rest in seven have rendered moot what was perhaps the prime purpose of the ancient Sabbath laws. Some of the cases cited—or decided—deal with injunctive relief; others with the interpretation and enforcement of municipal ordinances, and still others with criminal prosecution. If it is possible to generalize at all from the many decisions dealing with this subject, it is my opinion that if a law is found to be valid and constitutional but the enforcement is shown to be intentionally or designedly discriminatory, the defense of discriminatory enforcement is available to the person seeking to take advantage of that defense and is a complete shield as to him from the application of the law. It may properly be said that where a defense or claim of discriminatory enforcement of a constitutional law is made,

the validity of that defense depends upon the facts shown in that particular case.

In some of the cases cited and in other opinions or cases to which they refer, the offer of proof or proof has not been strong enough to show an intentional discriminatory enforcement of the law involved. The opinion in *Utica Daw's Drug Co.* (supra) stated:

> "It is only when the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others, that a constitutional violation may be found."

In the case at bar, using only references to, or excerpts from, the voluminous transcript of the testimony taken at the hearing held herein, it appears that the motivating influence behind the attempt of individuals to enforce the prohibitions of the Sabbath laws was economic, rather than a desire to have a law enforced. The enforcement was designed to discriminate against the defendant, and the other questions propounded must be answered in the negative. One of the witnesses, who caused the arrest of several of his store's competitors, testified:

> "Our quarrel is with stores comparable to our own; they are not little independents; they are serviced by voluntary cooperatives with all kinds of financial backing."

> "When Sunday openings are as extensive as they are we think the law should be enforced. *It wasn't so important when they were mom and pop stores, but that isn't the case today;* these stores are as big as ours; they are served by extremely large wholesalers."

The same witness also stated:

> " * * * It was left to my judgment as to what program should be initiated to do something about getting these stores closed and the law regarding the Sunday openings enforced."

And, the testimony of numerous persons shows that this particular witness caused the first of the arrests presently before this Court to be made and personally brought the question of Sunday sales violations before the Executive Committee of the Retail Merchants' Council of which he happened to be a member.

Moreover, it appears that the defendant's store from which purchases were made was adjacent to, and in the same shopping plaza as, one of the stores of this same complaining witness, and that it competed with that store economically. It cannot be said that the present prosecution had any deterrent effect upon other merchants, for the testimony taken is devoid of any reference to any stores closing because of the prosecution or prosecutions initiated. The Sheriff of Monroe County testified that in more than twenty-five years, to his knowledge, the Sabbath laws had not been enforced in Monroe County by his office or any other official agency. The Chief of Police of the City of Rochester testified, in effect, that he had an ample staff to investigate any complaints made of the violation of the Sabbath laws. It is interesting to note that the defendant in this prosecution was arrested at the request of another merchant who had, himself, been arrested for a violation of the Sabbath laws. The public law enforcement officers did nothing on their own initiative to initiate or further the enforcement of this particular law, although over two hundred purchases were made by agents of the defendant on Sunday, December 30, 1962, from merchants of all de-

scriptions, and the purchases made were all of articles whose sale was forbidden by the Sabbath law.

From the testimony it appears, and the Court finds, that a relatively small group of merchants, known as the Executive Committee of the Retail Merchants' Council, approved the action of one or more of its members in purchasing on Sunday articles that were not to be sold on that day, and that this relatively small group initiated this prosecution (and the others) for solely economic reasons—meaning reasons of business competition—and not for reasons designed to effect a general obedience to the prohibition of the Sabbath law (Sections 2140, 2141 and 2147 of the Penal Law of the State of New York). In this case the enforcement is found "designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others, • • • ."

Another point remains. It has been stated judicially that "the wrong sought to be prevented is a wrong by public authorities" (*People v. Utica Daw's Drug Co.* (supra)). We have found that the discrimination involved in the case at issue was discrimination by members of the Executive Committee of the Retail Merchants' Council. We have found that the public authorities, as such, did nothing on their own initiative to institute the enforcement which led to this hearing. However, the testimony amply reveals, and this Court so finds, that the public authorities knew that the Sabbath laws were being violated by the community at large; that they did not and do not intend to enforce the particular statutes generally; that they cooperated with the Executive Committee to the extent that they served many of the warrants caused to be issued by the Committee and, in the case at bar, actually prepared the

information and made the arrest; that they also caused each of the thirteen arrests made to be presented to the Grand Jury. In view of the foregoing, the Court finds that the public authorities by prosecuting only those defendants whose arrest would not have resulted except for the prior instigation of the Executive Committee, and at the insistence of the Executive Committee became—although, perhaps, reluctantly—agents of that merchant group and, as such, chargeable with that group's discriminatory design. Hence, this Court must find that the wrong here sought to be prevented is also a wrong by the public authorities.

In passing, the Court alludes to the recent holding of *People v. Pam*, 38 Misc. 2d 296, in which the Court held that the defendant in that case had failed to prove discriminatory enforcement of the Sunday or Sabbath law. In my opinion, that case is readily distinguishable from the one at bar, because there no evidence was offered or received as to the sale of goods whose sale was prohibited on Sunday. The testimony there can best be summed up by quoting (p. 299):

> "If he has proved anything at all herein, the defendant has proven merely some non-enforcement of the statute and that some other and nonrelated businesses were permitted to operate on Sundays."

Such was not the case as regards the evidence and testimony now before this Court. Here, the Court must find that the statistical disparity between violations and enforcement most readily supports a conclusion of discrimination.

The reluctance of some courts in upholding the defense, which is the basis of this motion, is particularly referred

to at page 20 of the *Utica Daw's Drug Co.* case (supra). That reluctance has been defined as a fear that guilty persons would thereby escape prosecution and the flouting of the law would be encouraged. This Court believes such a fear has no applicability to facts such as those it now considers. Or rather, such a fear is meaningless when the law in question is one which is already being violated openly and flagrantly by the community at large.

Upon all of the evidence received herein, and upon the law as this Court understands it, the motion of the defendant, The Paine Drug Company, to dismiss the indictment herein, upon the ground that it has been denied equal protection of the law, in all respects, is granted, and the indictment is dismissed.

Submit order accordingly.

Dated: June 19, 1963.

GEO. D. OGDEN (C. H. J.)
Monroe County Judge

APPENDIX B

Opinion of Appellate Division, Supreme Court

SUPREME COURT — APPELLATE DIVISION
Fourth Department

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

vs.

THE PAINE DRUG COMPANY,
Respondent.

No. 420/1964

Argued: September 16, 1964

Decided: December 3, 1964

Present: Hon. Alger A. Williams, Presiding Justice; Hon. Earle C. Bastow, Hon. Frederic T. Henry, Hon. Robert E. Noonan, Hon. Frank Del Vecchio, Associate Justices. Appeal by People from an Order of Monroe County Court, Ogden, J., dismissing the indictment.

Order entered June 21, 1963.

Appearances:

John C. Little, Jr., Esq., Attorney for Appellant, Nicholas P. Varlan, Esq., of counsel, Hall of Justice, Rochester, New York.

Keenan, Carroll, Harris, Creary & Beck, Attorneys for Respondent, Robert L. Beck, Esq., of counsel, 226 Powers Building, Rochester, New York.

OPINION

BASTOW, J. The indictment herein charging defendant with the misdemeanor of "Sabbath breaking" in violation of sections 2140, 2141 and 2147 of the Penal Law was dismissed and the People appeal. In accordance with the procedure suggested in People v. Utica Daw's Drug Co., 16 A D 2d 12, a hearing was held and the determination was based on the proof there presented. The court concluded (39 Misc. 2d 824) that the return of the indictment was a discriminatory act that denied defendant equal protection of the law in violation of its constitutional rights. (U. S. Constitution, XIV Amend.; N. Y. Constitution Art. I, § 11)

The test to be applied when such a claim is made was long ago stated in Yick Wo v. Hopkins, 118 U. S. 356, 373-374; "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered *by public authority* with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (Emphasis supplied) We find no such proof in the record before us. Indeed, the proof is to the contrary.

It appears that a group of prominent merchants in Rochester and environs — members of a Retail Merchants' Council — became concerned with the general non-observance of the Sabbath Laws by certain of their competitors. They met with a group of public officials, including the Sheriff and District Attorney of the county. Their requests for prosecution of violators received something less than enthusiastic responses. The then District Attorney

stated his doubts as to the enforceability of the so-called "Sunday laws" because of the numerous inconsistencies therein. But he informed the group and thereafter steadfastly maintained his position that any specific complaints of violations presented to him would be transmitted to police officials for appropriate action.

The group of merchants, having failed to get responsive action from public officials, thereafter with the assistance of certain of their employees made direct purchases on several Sundays in several so-called supermarkets and large drugstores. The individual making the purchases then proceeded before a magistrate, swore to an information and caused a warrant to be issued. These were served by peace officers.

Significantly, defendant was not one of those from which purchases were so made or against which a prosecution was so instituted. That came about through the implementation of the announced policy of the District Attorney. One of he individuals arrested through the activity of the group of citizens complained to the arresting officer that certain other drugstores were open on Sunday and mentioned defendant by name. When this complaint was relayed to the prosecutor he instructed the officer to investigate and act on the complaint. In the words of the District Attorney the police officer inquired "what do I do (about the complaint)" and he was told by the prosecutor: "If he (the person under arrest) is complaining (about appellant) you do the same that you did on the complaint against him." This resulted in the return of the indictment against defendant.

The conclusion of the court that there was discriminatory enforcement of these laws was based on two findings.

First, that the activities of the group of merchants in initiating the prosecutions was solely for economic reasons and second, that the "public authorities" (presumably the District Attorney) became agents of the merchants' group and "chargeable with that group's discriminatory design." We are unable to agree with either of these findings.

The proof establishes that the action of this group of citizens was not solely for economic gain. The gentleman, who perhaps spearheaded the movement, testified that "no who perhaps spearheaded the movement, testified that "*no* particular store poses an economic threat to me if I want to open on Sunday." He related that instead he was faced with a moral problem which he described in this fashion: "* * * the economic problem forces a moral problem on me because then I have to make a decision as to whether or not this is a sufficient competitive reason for me to stay open on Sunday. By me I mean our organization and our employees." In other words this small group of men did not act primarily for economic reasons or economic gain. If their competitors were not forced to obey the law then they were faced with the alternative of remaining open on Sunday with the resulting violation of law by themselves and their employees. The proof is clear that it was their distaste for the latter choice that motivated their activities and not economic gain or economic survival.

Equally untenable, in our opinion, is the finding that the "public authorities" on the theory of agency became chargeable with the "discriminatory design" of the group of merchants. The activities of the latter may have been selective but it is doubtful if it was discriminatory. This small group, working without assistance from public offi-

cials, could not undertake to prosecute every violator of the Sunday laws. Their objective was the operators of supermarkets and large drugstores. This objective they pursued with their limited facilities without proof of discrimination as to their target group. We find no pertinency to the finding that public authorities cooperated with the group of merchants "to the extent that they served many of the warrants caused to be issued by the Committee." Once an information had been laid before a magistrate and a warrant of arrest issued, the police officers had no choice but were obligated to execute the warrant. A neglect or failure to do so would have made the officer guilty of a misdemeanor (Penal Law, § 1849).

In any event, the prosecution of defendant was only remotely caused by this group activity. The proximate cause thereof was the functioning of the even-handed and non-discriminatory announced policy of the prosecutor that all specific complaints would be investigated and prosecuted.

We find no proof to establish a pattern of discrimination consciously practiced by any public official. At most the proof "merely indicated some non-enforcement as to certain other businesses many of which were allowed to remain open for the sale of permitted commodities." (People v. Friedman, 302 N. Y. 75, 81.)

The order should be reversed and the indictment reinstated.

Williams, P. J., Henry, Noonan and Del Vecchio, JJ., concur.

APPENDIX C

Judgment of New York Court of Appeals

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 22nd day of April in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

Witness, The HON. CHARLES S. DESMOND, Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR April 22, 1965.

(SAME TITLE)

BE IT REMEMBERED, That on the 8th day of February in the year of our Lord one thousand nine hundred and sixty-five, The Paine Drug Company, the appellant in this cause, came here unto the Court of Appeals, by Keenan, Carroll, Harris, Creary & Beck, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by John C. Little, Jr., District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Therefore, it is considered that the said order be affirmed as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Monroe County, before the judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, before the judges thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office
Albany, April 22, 1965

(SEAL) I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Robert L. Beck, of counsel for the appellant—, and by Mr. Nicholas P. Varlan, of counsel for the respondent — and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

AFFIDAVIT OF A. GOULD HATCH

STATE OF NEW YORK)
COUNTY OF MONROE) ss:

I, A. GOULD HATCH, Clerk of the County of Monroe of the County Court of said County and of the Supreme Court, both being Courts of Record having a Common seal.

DO HEREBY CERTIFY That I have compared this copy with the original filed or recorded in this office and that the same is a correct transcript thereof and of the whole of said original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said County and Courts on May 10, 1965.

(SEAL) /s/ A. GOULD HATCH,
Clerk.

Facsimile signature used pursuant to Sec 903 of County Law

C-116492